No. 16128

United States Court of Appeals

FOR THE NINTH CIRCUIT

CHARLES W. CARLSTROM, SOUTHERN CALIFORNIA CHILDREN'S AID FOUNDATION, INC., a corporation, SOUTHERN CALIFORNIA DISTRICT COUNCIL OF THE ASSEMBLIES OF GOD, INC., a corporation, and THE SALVATION ARMY, a corporation,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' REPLY BRIEF

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CASES

No. 16323

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THE STATEMENT OF THE CASE

Appellants trust that their endeavor to achieve brevity in their opening brief did not deprive this court of an adequate statement of the case. It was our belief that the reference to the taking of the property and the proceedings in condemnation prosecuted by the United States sufficiently indicated the nature of the issues and the jurisdiction of the Federal Courts.

Approximately one-half of Appellee's Brief (pages 3 to 73), denominated "Statement", adds an abbreviated history of the course of the trial itself and reflects great diligence on the part of the authors in persual of the 7500 pages of Reporter's Transcript. Fortunately for the readers of this brief, no attempt is made to include the figures and mathematical calculations which embellish the testimony of the 16 witnesses included. As an example of the authors' skill in condensation we refer only to the partial testimony of the government's witness, John E. Hallock, which occupies 334 pages of the printed Transcript of Record (P. 67-1005); in full, 433 pages of Reporter's Transcript (p. 1054-1487). Appellee's Statement reduces all this to 3 pages (Brief p. 18-20). The testimony of the other witnesses was not as fully included in the printed transcript but it is fair to say that Appellee's excellent summary of the trial reduces the volume of what the jury had to endure by at least 90 per cent, this entirely apart from the figures incorporated in the 500 exhibits admitted in evidence, only a small portion of which are reproduced in the Transcript of Record, Vol. VI.

Appellee airily waives aside the effect of what it terms "this vast tautology". (Brief p. 88):

> "The jury had seen the property. It heard detailed description of its condition. It had heard the preparation, the factors, the reasons, the highest and best uses, and the fair market values repeated 14 times with variations so that even a juror hearing by pure rote should have almost been qualified to take the stand and testify as an expert himself." (Brief p. 84-85)

"With variations" is right! Nowhere did the experts use the same figures and no two of them agreed on the same valuations. Moreover, it must have become apparent from the objections of counsel and the rulings of the court made in the presence of the jury and commented upon by the trial judge that the learned counsel in the case had come to no common belief as to either the facts or the law of the case. If a jury is to learn by rote, its teachers (witnesses, counsel and judge) should at least be in agreement amongst themselves.

RULINGS ON ADMISSIONS OF EVIDENCE

Appellants shall not undertake detailed rebuttal of Appellee's argument on points of law as applied to the instances of admission and exclusion of specific evidence which were presented in Division II of the opening brief (A to G).

The last 30 pages of the government's reply brief furnish much sound argument and an imposing array of authorities which do little more than support Appellant's opening admission (p. 57) that trial courts have

considerable latitude of discretion in this field. There is no dearth of decisions which decline to reverse a trial court's judgment because of its admission or exclusion of a particular line of evidence.

The instances cited by Appellees generally arise out of rulings considered offensive by the land owner and endorsed by the condemning authority. The principle works both ways, however, and we are unable to find where there has been reversal of a trial court on complaint of the condemnor simply because it has exercised its discretion in a particular instance in a manner different from that which the reviewing court might choose to employ. In other words, had the trial court, here, ruled in favor of the Appellants in any one or two of the seven separate instances cited, (A-G), a claim of reversible error by the government would probably be rejected by this court on its appeal, by reason of constituting a separate ruling within the field of discretion available to a trial judge. Thus, to apply Appellee's excellent argument under Section II, any single ruling of the trial court would be supported and reversal would not follow by reason of any single ruling. Reversal would have to be based on the cumulative effect of the rulings in the light of the overall state of the evidence.

The case at bar differs from the ordinary condemnation case dealt with in the court decisions cited on both sides, in this - - there were here available no clearly comparable transactions. This was by reason of the specialized improvements on a huge property lying near the heart of a great city. The expert witnesses disclosed their searches for comparable transactions as far away as Los Angeles and amongst

relatively small and remote properties in San Diego. About the only like sale was the one to appellant Carlstrom in 1947, which was comparatively ancient and unquestionably in the nature of a distress sale by the government. The trial court's decision, reported 164 Fed. Supp. 451 at page 457 says:

> "Following the conclusion of the War, there was public clamour for disposition of alleged surplus property. The government had difficulty finding a buyer and finally on May 4, 1948, this portion of the original Plancor was sold to Charles W. Carlstrom for $1,050,000. This is the portion of the Plancor later condemned by the government and involved in this proceeding."

About the only like leases were the ones by Carlstrom to Convair which the court considered to be "privileged" and kept from the jury. Both Appellants' authorities and those cited by Appellees, recognize and generally declare that the best evidence of fair market value consists of comparative transactions. Question seldom arises on that score since in most condemnation actions at least a few recent transactions involving like property in the vicinity may be found.

Where no satisfactory comparatives are produced, resort may be had to theoretical or calculated values which involve capitalization of income, cost of reproduction, amount of depreciation, necessity of repairs, etc. Questions frequently arise concerning the use of these secondary approaches to ascertainment of fair market value but they are not considered to be determinative factors where true comparatives are available. In such cases the theoretical or calculated

values are important only by way of checking upon and testing of the primary approach - actual transactions.

In their opening brief Appellants conceded that the trial court has wide discretion in the admission of evidence in both fields. The government merely confirms this by its citation of authority. In most of the cases the evidence also shows real strength in the primary field. Where such evidence is unavailable or is unsatisfactory, resort must perforce be had to the secondary fields but the authorities do not endorse reliance alone upon one or more of the theoretical or calculated approaches. They require consideration of all customary approaches. Thus, in reading the cases where the Appellate Courts decline to interfere with a ruling of the trial court, we find, time after time, the explanation of the reviewing court that the jury also had before it other standards for determining value. These, of course, could be in the primary field or in the secondary field or in both.

In our case it appears throughout the record that evidence in the primary field was woefully weak on both sides. For that reason the jury should have been given both sides of all the other factors in the secondary field - neither one side of all of the factors nor both sides of some of the factors. The fact on this appeal is that out of the seven points of difference between Appellants and the United States (quite apart from the double barrelled trial) all seven points were resolved in favor of the United States. It is Appellants' contention that discretion uniformly exercised in favor of one side or the other would become abuse of discretion under the overall circumstances of this case. This is true even though in each instance, standing alone, a

reviewing court would be unwilling to veto the exercise of discretion in the court below.

Consider the plight of the defendants who were faced with the burden of establishing and maintaining the items of market value of every parcel taken by the United States. They, as well as the United States upon rebuttal, were unable to produce instances of recent comparative sales, and little more than the excluded Convair leases. The primary field was closed to both sides so both sides were compelled to resort to the secondary field. While the owners were afforded some latitude by the court in other instances, the ruling in the seven complained of kept from the jury certain factors which might have been favorably decided for Appellants; other factors were allowed to go to the jury under implications which were unfavorable to Appellants.

The rule of discretion is not absolute. In a case where comparables do not exist, neither a trial court nor an Appellate Court would be justified in barring all or a significant part of secondary evidence offered by either side. Proof of market value might thus be made impossible for one side or the other or, conceivably, for both sides. The practicable and fair course would seem to be to allow the jury to hear all secondary testimony and resolve it according to their own discretion. They should not be foreclosed by objections from either side supported by court rulings.

In the present case there were no down to earth comparative transactions. The expert witnesses were permitted to explore the outer space and came up with speculative figures, some as low as $2,000,000 aggregate - some as high as $10,000,000. (See Appellants'

Appendix I to III for breakdown). By the rulings complained of the jury was denied direct access to most of the figures in the secondary field but, over Appellants' objection, it was permitted in instance E to consider the original bargain price paid by Carlstrom and in instance A the cost of rehabilitation figured by Hallock.

Taken alone any one or two of the discretionary rulings complained of would hardly encourage an Appellate Court to send back for settlement or retrial such a long and complicated case as this. Had there been some average of the rulings - some in favor of the owners and some in favor of the government - there would be a disposition to let them lie. But here we have seven instances out of seven where discretion accummulated against the owners alone.

THE CONVAIR LEASES (D)

Some clarification would seem to be in order concerning application of the Cors case by the lower court and the government's reliance upon it here. The soundness of the principle announced by the Supreme Court is unquestionable (U.S. vs. Cors, 337 U.S. 325). Enhancement of value resulting from the government's special or extraordinary requirements for the property is not ground for increased compensation to the owner. It must be borne in mind that the Steam Tug there involved was taken directly by an instrumentality of the United States, War Shipping Administration. The United States took the vessel because it needed it, so the transaction fell within a closed circle.

This corresponded to the taking of the use rights

by the United States in our case at the time the first condemnation action was filed in 1953. Naturally, a jump in value could not be thus created. But at the earlier date, when Convair entered into leases with Carlstrom, there was no participation by the United States. It was an open market transaction between a private owner and Convair, a private profit corporation. The mere fact that the United States was in the market for certain finished products which Convair proposed to manufacture according to government specifications placed the government under no necessity. It was free to contract for the same articles with any other competent manufacturer in any other city.

The United States did not agree to pay Carlstrom any rent. It is glibly said that the government paid Convair's rent. So it might be said that Carlstrom pays his attorneys' office-rent! It is conceded that Convair used the same premises to produce goods for other customers, something like 15% of its output. Suppose it had been 51% or 49%. Just where would Convair become or cease to be an instrumentality of the United States? Just when would Convair acquire the right of eminent domain? It is worthy of note that Supreme Court justices Frankfurter, Jackson and Burton in the Cors case dissented from the majority opinion even where the alleged enhancement was created by a 100% instrumentality of the United States.

It is contended that the trial court in our case did not actually exclude the Convair leases; it admitted them after erasing all figures which might have given the jury concrete rental values of identical parcels within 2 years of the actual taking of the use rights by

the United States! These rental figures would have given also sound basis for computing the capital value of the respective fee estates. Production of the rental figures for the jury was the important reason for the owners' offer of the leases in evidence. Of like importance was the offer of proof of fair market rental values between June 1954 and July 1955. The implication is that this proof would have been independent of the Convair leases. (G. Opening brief p. 54-57).

The direct significance of rejection of the Convair lease prices and the rejection of certain Appellants' offer of proof, attaches primarily to the earlier stage of the trial when the useage values were being presented to the jury. In our opening brief we mentioned the bearing of these leases on the later consideration of fee values of the same property. This connection between the two phases of the condemnation is emphasized by a recent decision of this Ninth Circuit Court which is alluded to in Appellee's brief (p. 89). This case is Phillips v. United States, 243 Fed. 2d 1.

It involved numerous preliminary takings of useage terms with final taking of the fee. Separate condemnation actions were filed by the United States but all were combined for trial, apparently by consent of all parties. This court reversed the judgment based on separate verdicts of the jury on account of error of the court in excluding the effect of mineral potentials of the realty reflected in the leases. It was held that the error related to the fee valuation as well as to the use valuation so that the reversal must attach to the aggregate verdicts and to the whole judgment.

Reverting to the Convair leases, the government's

position on the unity of the United States of America with the Convair corporation may be reduced to absurdity by following through the customary performance of airplane construction and delivery. For example, Convair contracts with the government to construct so many airplanes to such and such specifications. For each it is to receive a price which may be a flat, overall price per unit or at cost plus a percentage, etc. Progress construction and final assembly are subject to government inspection and approval. Only specified parts and specified sub-contractors may be employed. Lockheed furnishes certain parts, Ryan furnishes some, Rohr furnishes some. Final assembly and delivery is by Convair.

Part of the "rent" paid by the United States is thus kept by Convair, part goes to Lockheed, part to Ryan, part to Rohr. The plane component furnished by each of the latter is subject to rejection and return if it does not pass government inspection. Doubtless the bulk of the business of the two smaller corporations falls in this category during periods of defense preparation. Are we to conclude that Lockheed, Ryan and Rohr, as well as Convair, are instrumentalities of the United States?

CARLSTROM'S PURCHASE PRICE (E)

The government enumerates with natural satisfaction many instances where Appellate Courts have held it to be within the discretion of the trial court to admit actual prices paid for identical properties within 3, 4, 5, 6, 7 years of government taking. Although the conveyance of the land and improvements to Carlstrom by

the United States was dated in 1948, the bargain was made and the price fixed in 1947. Thus the discretion of the trial court below was apparently stretched beyond periods generally found acceptable.

The Appellate Court in another of the cases cited by Appellee declared:

> "Recent sales of the very property condemned are entitled to considerable weight, but sales of similar property are entitled due weight also. Similar sales closer in time to the date of taking would reflect more accurately the condition of the market at the time of taking." (Hickey v. U.S. 208 Fed. 2d 269, 273) (Underscoring added)

We must not lose sight of the requirement placed on all transactions involving either identical or similar properties to the effect that the previous sale must be "reasonably recent and not forced." (Simmonds v. U.S., 199 Fed. 2d 305, 307)

LATITUDE OF SECONDARY APPROACHES

Appellants do not for a moment contend that cost plus depreciation establishes market value. No more does the estimate of an expert appraiser. True market value is rightly the reflection of current transactions in an open market. College professors and stock brokers may expound on the merits or demerits of a particular issue, but we turn to our daily newspapers for the market value of a particular stock share on a given day. Should the stock exchanges cease to operate

for a year or even for a month, the investing public would be relegated to the same sort of secondary inquiries as were or were not given to the jury in this case.

Appellee in its attempt to condemn the owners' efforts in this direction, aptly summarizes the views of our Appellate Courts which it cites at great length.

> "In practically all the cases where introduction of this type of evidence has been upheld, the circuit courts have been careful to point out either the uniqueness of the property or the absence of any comparable sales or other type evidence on which to base an award." (Brief p. 104.) (Underscoring added)

A few pages further on they quote from the court's instruction, insisted on by the United States, that the Convair lease figures are not to be considered because of:

> "*** the necessity of the government acting through Convair, the contractor *** for facilities for the particular kind as are involved in this case in the particular area ***" (Brief, page 107.) (Underscoring added)

Nowhere in the brief does Appellant refer this court to a single quotation of testimony or documentary evidence of a single "comparable sale". The only "other type of evidence" consists of the utterly irreconcilable expert opinion valuations and the particular secondary approaches which were favored by the government and approved by the trial court. It was this

surprising situation which lead Appellants to make the "surprising" suggestion that the entire field of secondary considerations of value should be opened to consideration by the jury.

Appellants do not relish such a prospect but again we must remark that the whole vast tautology was invoked by the government and not by the owners nor the lessors. Appellee's attorneys were the architects of combination trial and its administrative officers devised and directed the piecemeal takings of the property. We cannot refrain from quoting the pithy summary of a like situation voiced by a venerable justice of this court a short time ago:

> "If we attempt to cut a condemnation proceeding into slices, it bleeds." (Phillips v. U.S., 243 Fed. 2d 1. Mar. 22 1957)

CONFUSION STILL PERSISTS

Coupled with these cumulative rulings and aggravated by them was the abuse of discretion in denying appellants' motion for separate trial of issues arising from the first leasehold taking and the subsequent fee taking.

Appellants appreciate the concern of counsel for the United States over the plight which would have confronted the owners if the trial court had granted their motions for separation of issues. It is, however, the actual plight of the jury which concerns us now. It cannot be denied that the time of trial was greatly increased by combination of the two issues - say by one

third, the number of exhibits by one-half, the columns of figures doubled. The complexities of the case engendered by the second taking and unification of trial of issues are not to be shrugged off.

As the Fifth Circuit Court decision pointedly observed in the Gwathmey decision, it is the United States which chooses the manner of takings and imposes the multiplicity. The least that should be accorded the owner is the right to divide the trial according to the sequence elected by the sovereign, particularly where the two takings are separated by two years time, not two months as in the Gwathmey case.

No one has the slightest suspicion of any willful disregard of evidence in connection with Tract 106. Appellants harbor only a feeling of understanding and sympathy for this jury. "Blue Ribbon" or not, in its verdict on this item, it manifested beyond any doubt a state of utter confusion in selection of valuations. Appellee seeks to brush off the significance of this by characterizing a mistake of $20,000 as "insignificant". Perhaps it is, in the book of a rich nation which can give away billions to strangers across the seas. But to an American citizen and three charitable corporations it has real significance. In itself it seemed worthy of a motion for new trial by the United States of America. In its implications it is worthy of a reversal by this court of the aggregate verdict of which it formed a part. In how many of the other twenty separate verdicts rendered by the jury were there insignificant mistakes of $20,000 or more each, and how many of these operated to the prejudice of appellants instead of to the prejudice of the United States?

Appellee seeks also to dispose of the Gwathmey decision by belittling the similarity to our case. The test does not lie in the number of parcels or parties alone. It lies in the opportunities for confusion and the signs of it in the particular record. A thousand parcels of unimproved adjoining lands might require only the application of an average price per acre. Seventy acres of metropolitan property, improved and involving a two-year spread of time with partial and conditional takings, might well multiply the difficulties 70 times. The periods of time required for trial and the volumes of the transcript and exhibits furnish a pretty fair index of the comparative complexities and difficulties before the respective juries.

In the Gwathmey case (quoted p. 27 of appellants' opening brief) the Circuit Court of Appeals did not hesitate to surmise that "the task of the jury was so overwhelming they must have used whatever method of computation or approximation of values seemed reasonable to all twelve". So it must have been in our case. In addition, as the United States pointedly surmises (Reply Brief p. 8) in recesses during the trial, members of the jury undoubtedly made private inspections of the premises. Such conduct, of course, was improper and has often been held to constitute sufficient ground for vacating a verdict.

It is not likely that anyone connected with this case believes that the jurors intelligently arrived at a definite valuation for each of the several parcels and tracts and gave an independent verdict thereon. Human nature being such as it is and the human mind having limitations of memory and power of analysis, our jury must have used whatever method of computation or

approximation of values seemed reasonable to all eleven.

Appellee properly points out that not all of the court hours devoted to this trial were spent in the presence of the jury. Adopting its deletions (Reply brief p. 73) it fairly appears that the jury enjoyed recesses corresponding to 2000 pages of transcribed reporter's notes. During much of that time, however, the members were held in attendance in the corridors awaiting call. This cumulative recess was doubtless made up by the 15 days of deliberation which period is not measurable by the length of the reporter's transcript.

Whatever the wear and confusion generating listening time may have been, the 500 documentary exhibits in in the case graphically reflect the stockpiling of varying and contradictory figures which the jury was called upon to unravel in the end.

We respectfully invite any and all members of this court of Appeals to review and analyze all the figures appearing in Volume VI of the printed Transcript alone and emerge with anything better than blurred vision and mental uncertainty!

CONCLUSION

This is a lawsuit about money but, as pointed out in the opening brief, it centers around principles which the courts have been diligent to defend since Magna Carta days. Appellants in their opening brief (p. 23-30) quoted extensively from the decision in the

Gwathmey case because of the logical philosophies voiced there. Counsel for the United States dare not question this courageous bulwark presented for the protection of the citizen property owner against the exigencies or fancied exigencies of his own sovereign.

In the court below and now in this court they seek to escape these principles by the bland announcement that there were no such difficulties presented in our own case as were apparent in the Gwathmey case. Beyond any question that is what the learned judge of the court below believed at the beginning of our trial. To his trained mind the prospect did not seem to alarming nor the burden of the jury too difficult. He, and we must say the attorneys on both sides, made every endeavor to pilot the jury through the morass in which they shortly found themselves.

The government attorneys conclude (reply brief p. 85) that in one instance only did the jury go astray and that only for a distance of 20,000 dollars, which, after all, is nothing in terms of mere money It is infinitely more as a badge of confusion and frustration As the reply brief points out with pride, the jury had a roomfull of figures, schedules and calculations from seven different sources, no two alike. It took 15 days milling around amongst these and others of their own proposing. Small wonder that in desperation they adopted the 36 figures for the 5 sets of equations handed to them for solution. Evidently not one of them, even upon the polling of the jury, noticed the inexcusable error regarding Tract A-106.

There was far more disparity in the figures, schedules and calculations furnished to them for the

other tracts; hundreds of thousands of dollars in some instances. What did the jury members actually believe and have in mind when they agreed on these other 35 valuations required of them?

The executive officers of the United States initiated this "vast Tautology" of confusion (credit to Appellee's counsel - reply brief page 88). It took them over 2 years to make up their minds whether they wanted full title to the property or only partial title. They took it piecemeal - first the minimum term occupancy, then the optional extended term occupancy - finally fee title. The department of justice rejected the owners' plea for simplification of any sort. Let the result be on their heads!

It is, of course, a matter of grave moment to the Appellants whether or not they are to have an opportunity to submit their single case on the fee values upon a retrial. In all likelihood the useage values remaining may be disposed of by settlement. It might be, even, that the United States and the owners, with the expert valuations before them and with such clarification as the Court of Appeals may give on the questions of admissibility of evidence, would be able to arrive at agreed compensation for the fee takings. If not, they might be willing to submit the testimony on separated issues to a district judge sitting without a jury.

Aside from our admitted interest in an increase of award, particularly for the fee titles, we submit that the proceedings of the United States in its piecemeal taking and in depriving the owners of their constitutional right to separate trial of issues, should not receive the blessing of our higher courts which would be implicit

in an affirmance of the judgment of the District Court.

It would seem that the administrative officers of the United States as well as its legal advisors should have heeded the admonitions of the Court of Appeals in the Gwathmey case (Opening brief p. 28, 29, 30). Had the government determined on a clear concise fee acquisition in the first place, or had it proceeded diligently with condemnation of the useage rights instead of waiting over two years before changing its mind and seeking to tack on a fee condemnation (opening brief p. 2) the complications complained of (opening brief Section One. p. 16) would never have arisen.

Appellants had and have no objection to inclusion of several parcels or tracts in either condemnation proceeding. In fact, as Appellee points out, they desired this as a basis for seeking unification valuation of their properties. True, the inclusion of additional parcels, particularly where improvements exist, does require additional time for trial and does cumber the record with more figures, but such an election by the sovereign does not necessarily infringe upon "the individual landowners constitutional rights to due process and just compensation". Somewhere a line must be drawn, however. The Fifth Circuit Court of Appeals has said less than 25 days between takings and amendment of pleadings; less than 8 weeks in resulting trial time. We suspect that the trial court itself in the Gwathmey case would not have countenanced such extension of limitations as exists in our case: 30 times as long between takings; almost 3 times as much trial time. (Gwathmey 8 weeks - Carlstrom 23 weeks).

We do not attribute to the administrative branch of

our government any sinister motives in refraining from a single taking of the fee in this case. Neither do we criticize the Department of Justice for its resistance to Appellants' efforts to simplify the trial. Its attorney, Mr. McPherson discharged his duty when he stated to the court his agreement that consolidation would be of benefit to the government. Least of all do we intimate any degree of intentional favoritism on the part of the trial judge in requiring a single trial and a single set of verdicts. We do feel that he underestimated the resulting burden on the jury and overestimated his own ability to keep its members and the respective attorneys in the case in the straight and narrow path.

Again we quote from decision of this court speaking through Justices Stephens, Orr and Lemon:

> "Never niggardly in its standards for the compensation of the expropriated landowner, the Supreme Court has grown progressively more liberal in its cannons for the reimbursement of those who are dispossessed through the right of eminent domain."
> (Phillips v. U.S. 253 Fed. 2d 1. 1957)

Inasmuch as this honorable court is in no position to alter the respective verdicts or weigh the evidence - either that which was admitted or that which was rejected - it would appear that the reversal prayed for is the appropriate and only effective means of applying liberality in the canons for reimbursement which it has already approved.

Respectfully submitted,

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